

Chapter 5

Report Writing and Case File Documentation

I. Scope.

This chapter sets forth the policies, procedures, and format for documenting the investigation and for properly organizing the investigative case file.

II. Administratively Closed Complaints

In cases which are not docketed after the initial screening, the file arrangement of materials as outlined below need not be followed. All administratively closed cases must be appropriately entered into the IMIS system. Additionally, a letter to the complainant, documenting the discussion with the complainant and the reasons why the case is not appropriate for investigation, will be sent by the investigator. A copy of the letter, along with any related documents will be placed in the “Dead” File.

III. Case File Organization.

- A.** As part of the case logging process, the investigator will prepare the case file.
- B.** The investigator will set up the file with the OSHA - 87 form, transmittal documents and administrative materials on the left side. All evidentiary material will go on the right side. Care should be taken to keep all material securely fastened in the file folder to avoid loss or damage.
 - 1. Evidentiary material normally is arranged as follows:
 - a. Copy of the complaint, OSHA-87 form or the appropriate regional intake worksheet
 - b. Documents from IOSHA or other agency enforcement files
 - c. Complainant’s signed statement
 - d. Remaining evidence (statements, records, etc., in logical sequence)
 - e. Investigator’s rough notes
 - f. Case Activity/Telephone log
 - g. Report of Investigation
 - h. Table of Contents (Exhibit Log)

2. Separation of Materials. Administrative and evidentiary materials will be separated by means of blank paper dividers with numbered index tabs at the right or bottom.
 - a. Administrative documents will be arranged in chronological order, with the newest being on top.
 - b. Evidentiary material tabs (right side of file) will be numbered consecutively using Arabic numerals, with the highest number at the top of the stack.
 - c. A "Table of Contents" sheet identifying all the material by exhibit must be placed on top of the last exhibit on the right side. Nothing should be placed on top of the Contents of Case File sheet.

IV. Documenting the Investigation

A. Report of Investigation (Formerly called Final Investigative Report or FIR).

The Report of Investigation (ROI) is the summary of the investigation; and as such is written as a memo from the investigator to the IA. The ROI must contain the information below. The ROI must include citations to specific exhibits in the case file as well as other information necessary to facilitate supervisory review of the case file. The first page of the ROI must set forth the name of the case investigated and list the parties' and their attorneys' names, addresses, phone numbers, fax numbers, and e-mail addresses, but nothing else. See the appendix to this chapter for a sample format for the ROI.

B. ROI Format. As shown in the sample, format for the ROI is as follows:

1. **Allegation.** Give a brief account of the Complainant's allegations; *e.g.*, "Complainant alleges she was discriminatorily discharged for refusing to work on an unsafe scaffold."
2. **Timeliness.** Indicate the actual date that the complaint was filed and whether or not the filing was timely.
3. **Defense.** Give a brief account of the Respondent's defense; *e.g.*, "Respondent claims the Complainant was discharged for excessive absenteeism."
4. **Coverage.** Give a brief description of the company to include location of main offices, nature of primary business, etc.

5. **Witnesses:** List all witnesses interviewed during the course of the investigation. Include the witnesses' job title or classification, street address, city, state, zip code and a contact phone number.
6. **Investigative Findings:** The Investigative Findings section should begin with descriptive background information on the work site and history of safety and health activity, if any, and flow from there through the events relating to the alleged discrimination. The findings should be written in a narrative, "story telling" format. References should be made to the exhibit numbers of relevant information (and the location of the information within the exhibit, if necessary). References should be given with sufficient frequency to permit a reviewer of the file to easily locate the evidence supporting the findings. All exhibits should be referenced at some point in the Investigative Findings, or their relevance to the case should be questioned. Please see the example ROI at the end of this chapter.
7. **The Elements of a Violation.** Evaluate the facts presented in the Secretary's Findings as they relate to the four elements of a violation, following Chapter 3, Section V. Questions of credibility and reliability of evidence should be resolved and a detailed discussion of the essential elements of a violation presented.
 - Protected Activity
 - Respondent Knowledge
 - Adverse Action
 - Nexus
 - Credibility
8. **Other Relevant Information.** Any novel legal or other unusual issues, related complaints, investigator's assessment of a proposed settlement agreement, or any other relevant consideration in the case may be addressed here. The closing conference should be documented in this section of the ROI.
9. **Recommendation.** This is a concise statement of the investigator's recommendation for disposition of the case.
10. **Reinstatement.** In meritorious cases, the complainant may wish to be reinstated to his/her original position, or the complainant may no longer want to be employed by his/her former employer or work in his/her original position. In either case, document whether the complainant wants to be reinstated or not.
11. **Back Wages.** In meritorious cases, the complainant may want to back wages. Calculations of those wages should be kept using the Back Wage

Calculator supplied by OSHA and a copy of those calculations attached to the ROI.

12. **Interest.** Interest can be paid to the complainant in addition to back wages. Indicate the amount of interest and include the calculations with the ROI.
13. **Punitive Damages.** In merit cases, the rationale for ordering any punitive damages should be concisely stated here.
14. **Expungement.** If the complainant wishes to have any documents expunged from his/her personnel file, indicate which documents here.
15. **Posting.** Posting of a Settlement Agreement should be indicated here.
16. **Other Damages.** Any other damages that are not discussed should be documented here.

Sample Documents

from

Chapter Five

Report of Investigation

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Sample Report of Investigation

Report of Investigation

Date: September 20th, 2011

To: Administrator's Name
IOSH Administrator

From: Investigator's Name
Discrimination Investigator

Subject: Complainant v. Respondent/Case File 00-0000

Complainant: Complainant
123 Main Street
Anytown, USA 12345
Phone Number

Represented by: None

Respondent: Respondent Name
123 Main Street
Anytown, USA 12345
Phone Number

Represented by: Attorney's Name
Associate Counsel
123 Main Street
Anytown, USA 12345
Phone Number

| | <i>Analysis</i> | <i>Exhibit</i> |
|--------------------------|---|-----------------------|
| <i>Allegation</i> | The complainant alleged that he was terminated on May 15 th , 2011 for complaining about safety concerns to his supervisors. | #15, #16 |
| <i>Timeliness</i> | The complainant was terminated on May 15 th , 2011. The complainant filed his whistleblower complaint on June 20 th , 2011. Therefore, his complaint is timely. | #18 |
| <i>Defense</i> | The respondent claimed that the complainant was not terminated; rather, the complainant quit his employment when he was informed that he was going to be demoted from foreman to laborer. | #10 |
| <i>Coverage</i> | Respondent provides a variety of construction services to a variety of markets that include, but are not limited to, cultural, education, sports and health markets, data centers and transportation facilities. Respondent is also a contractor with several projects across the United States, and Canada. Respondent is currently involved in building a large project in the Anytown, USA area known as the Project Site, one of the largest projects in the nation. Respondent currently employees approximately two hundred and forty (240) employees at the Project Site, some of which are represented by various unions. | #11 |

Witnesses

[illegible]

Investigative Findings

Complainant worked for Respondent at Project Site in Anytown, USA from April 3rd, 2011 until May 15th, 2011. The complainant was hired as a carpenter and supervised about four (4) other laborers and reported directly to witness Employee #1. The complainant has worked for the Respondent on other projects in Iowa, Kansas and Nebraska as a carpenter since June 2007.

Respondent has a safety program in place that allows for the workers to fill out and submit a form if there is a safety concern. (Exhibit #13) The form can be submitted with or without an employee's name. (Exhibit #1) Respondent also has a phone number that employees can call in to express a concern about a safety issue if they want to remain anonymous. New employees are provided with this information before they go on their jobsite when they meet with witness Employee #2. (Exhibit #1) The complainant submitted several safety concerns to the Respondent. (Exhibit #14)

The complainant is described as a friendly person that enjoys working but likes to talk, which interfered with his job as a carpenter. As a carpenter, the complainant is described as a non-leader, provided no leadership to his labor crew, absent minded and would have his labor crew start a task and then change his mind in the middle of the task about the way that he wanted the task done. (Exhibit #1, #2, #3, #4, #5, #6, #7, #8, #9)

The complainant began working at the Project Site on April 30th, 2011 before the majority of the Respondent's employees began working. (Exhibit #14, #16) The complainant was originally hired to build forms for the bases at the bottom of the project (Exhibit #1) but helped with the start-up of the construction trailer jobsite area. On April 30th and May 1st, 2011, the complainant was tasked to build saw horses, forms and sign blanks that would be used at the jobsite. On May 2nd, 2011, the complainant was assigned to construct a wooden form. Witnesses Employee #7 and Employee #8 helped the complainant with the construction of the form. (Exhibit #14) Witnesses #1 and #2 were in the construction site while the deck was being constructed and would occasionally watch the complainant and witnesses #7 and #8 as they constructed the wooden form. Witness #1 noticed that the complainant was not spacing the boards apart; rather he was placing the boards side-by-side. Witness #1 asked the complainant about spacing the boards and the complainant replied that the boards were new and that they would space as they dried. Witness #1 informed the complainant that she believed that the boards needed to be spaced to allow for water drainage and not buckle which could cause a tripping hazard. The complainant began to argue with witness #1 about the placement of the boards and the number of forms that he [complainant] had built. Witness #1 spoke to witness #2 about the conversation that had just occurred. (Exhibit #1, #2, #9, #15, #16)

Witness #2 spoke to the complainant about the form boards needing to be spaced apart. The complainant began to argue with witness #2 about the placement of the boards. Witness #2 told the complainant that he [complainant] would need to rebuild the form and place the boards with proper spacing. The complainant complied with witness #2's request but was upset that he had not been told how the form was to be built before he had begun. (Exhibit #2, #15, #16) According to the complainant, he knew that his working relationship with witnesses #2 and #1 was not going to be good. (Exhibit #15) According to witnesses #1 and #2, there had been

money budgeted for wooden forms to be constructed on each construction site, but due to the complainant having to re-build the original wooden form, there was no money to buy additional materials for wooden forms and metal forms would have to be used. (Exhibit #1, #2) The form was completed on May 4th, 2011. (Exhibit #14)

As workers began arriving to the jobsite, they began reporting for a multi-day orientation. During the orientation, the complainant was informed that he would need to report to witness Employee #5, general foreman, if one of the superintendents were not present. The complainant was introduced to his labor crew that consisted of four (4) total carpenters; witnesses #7, #8, Employee #6 and Employee #9. The complainant introduced himself as "Complainant" but also informed his crew that they could call him "boss". The complainant had the name "boss" on a label on his hard hat. This was also placed on his tools and his radio. Witness #5 heard that the complainant wanted to be referred to as "boss" and told the complainant that he was not "boss"; that the real "boss" was another construction worker who had worked for the Respondent and had recently passed away. (Exhibit #5, #6, #7, #8, #9, #15, #16) The complainant, along with his crew members, decided that he [complainant] would be called "pac man" instead. The complainant made a label that had the term "pac man" on it and placed it on his hard hat. (Exhibit #5, #6, #7, #8, #9) Witness Employee #4 had seen that the complainant had this label on his hard hat and told the complainant to remove the label. According to witness #4, the complainant was not surprised that the label was on his hard hat and made no mention that someone else had placed the label there. (Exhibit #4, #16)

As carpenters at the Project Site, the complainant and his crew were responsible for making forms to be taken to job sites where projects were to be built. The complainant and his crew members did the majority of the form building at the main jobsite yard but would, on occasion, have to build a form at a project site. The complainant and his crew were responsible for building saw horses from the materials at the yard if they needed them. They would use the back of the trailer instead of a saw horse, which, according to witness #6, made sense to him. When the jobsites first started, the complainant and his crew would have to carry materials and equipment up and down steep embankments. When it rained, it made the embankments slippery and the complainant complained to witness #5 about this being unsafe. The complainant also spoke with witness #2 about the steep, slippery embankments and the embankment slopes were reconfigured. Concrete was poured as a ramp to walk on. (Exhibit #3, #5, #6, #7, #8, #9, #15, #16)

The complainant spoke with witness #2 on a daily basis to talk about what was happening at the project site. The complainant would meet with his crew afterward and give them direction as to what was to be done on a given day. (Exhibit #3, #15) However, the complainant was not able to provide much direction to his crew. The complainant was known to tell his crew to do one thing and then change his mind and have them do something else. The complainant also forgot that a task had already been completed and would have one of his laborers do the same task again (ex: the complainant had witness #7 fill up some containers. The containers were filled and returned to the jobsite yard. The complainant then told witness #9 to go fill the same fuel containers with fuel). (Exhibit #6, #7, #8, #9)

The complainant did not help his labor crew as they worked; rather he would stand around and

talk or smoke cigarettes. On occasion the complainant would begin yelling for no reason and according to witness #8 it made the complainant “look like an ass”. (Exhibit #6, #7, #8, #9) Witnesses #6, #7, #8 and #9 would talk to witness #5 about how the complainant was acting and that the complainant was not providing them any direction. Witness #5 reported this to witness #2 who would, on occasion, go to a project site and watch the complainant work. (Exhibit #3, #5, #6, #7, #8, #9)

Witness #2 reported these concerns to witnesses #1 and Employee #3. Witness #5 made her concerns know to witnesses #1 and #2, too. Witnesses #1 and #2 determined that the complainant was not able to perform the job of carpenter effectively and a decision was made to demote the complainant to a laborer. Witness #5 was made aware of this decision. (Exhibit #1, #2, #3, #5)

On May 15th, 2011, the complainant came into the construction trailer early to pick up his equipment to get ready for his day. (Exhibit #3, #5, #15, #16) Witness #5 informed the complainant that he was no longer going to be the carpenter, which made the complainant mad. (Exhibit #3, #5, #12) The complainant took off his hard hat and threw it on the construction trailer floor. (Exhibit #3, #5) The complainant then left the construction trailer and walked to his vehicle. When the complainant got to his vehicle, he took off his vest and threw it on the ground. (Exhibit #5, #8, #15, #16) Later that day, the complainant called witnesses #7 and #8 and asked them to gather his equipment. (Exhibit #6, #8) The complainant came back to the project site later in the day on May 15th, 2011 to pick up his check. The complainant spoke to witnesses #1 and #2 and did not talk about any safety concerns that he had. (Exhibit #1, #3, #15, #16)

Conclusion

| | <i>Analysis</i> | <i>Exhibit</i> |
|----------------------------------|---|------------------|
| <i>Protected Activity</i> | The complainant did engage in a protected activity when he complained to witnesses Foster and Anderson about safety concerns | #3, #5, #15, #16 |
| <i>Employer Knowledge</i> | The respondent knew that the complainant complained about safety concerns | #3, #5 |
| <i>Adverse Action</i> | The evidence in this case does not show that the complainant suffered an adverse action; rather, the complainant quit his job once he found out that he was being demoted from a carpenter to a laborer. | #1, #2, #3, #5 |
| <i>Nexus</i> | There is no causal connection to the above elements. Timing is not an issue in this case and there is no evidence of disparate treatment or animus. | |
| <i>Credibility</i> | The complainant was found to be somewhat credible. He does come across as being very confident in what he has done for a living as a carpenter but that confidence also comes across as being arrogant. When asked questions about the building of the form, the complainant informed me that he had built 100's of forms and the form he was | #15, #16 |

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| | <p>building was no different. The complainant came across as being the type of person that can do no wrong and that everyone else is wrong. Some of the statements that were provided by the complainant were supported by all the witnesses with the exception of reporting safety concerns and the manner in which he left his employment with the Respondent.</p> <p>Witness #1, #2, #3 and #4 were all found to be credible witnesses. They provided information that was consistent with the complainant with the exception of the reporting of safety concerns and the manner in which the complainant left his employment.</p> <p>Witness #5 was found to be somewhat credible. She did supply information that was consistent with other managers and carpenters, but she did come across as being arrogant during his interview. When witness #5 was asked about her working relationship with the complainant, her answers did not come across as being genuine; rather they seemed practiced and her facial expressions did not match her answers – witness #5 was smiling when she told me that she had informed the complainant that she [complainant] was no longer going to be a carpenter.</p> <p>Witnesses #6, #7 and #8 were all found to be credible witnesses. They seemed nervous during the interviews but all provided some information that was consistent with management but more consistent with each other. They all seemed happy that the complainant was no longer working at the jobsite.</p> <p>Witness #9 was not found to be a credible witness. When she was asked questions, she would answer a portion of the question and then direct the answer in a different direction. Witness #9 had also been laid off by the Respondent and was not happy with that decision. Witness #9 would say that the complainant was a good foreman but in the same sentence would say that the complainant was not an effective carpenter.</p> | <p>#1, #2, #3, #4</p> <p>#5</p> <p>#6, #7, #8</p> <p>#9</p> |
|--|---|---|

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| <i>Other Relevant Information</i> | A closing conference was held with the complainant on October 4 th , 2011. The complainant was reminded of the four elements that were needed to support his allegation of discrimination. The complainant was informed that there was no evidence to support his termination being caused by his complaining about safety concerns. The complainant said that he figured that this would be the outcome and that the Respondent's employees were probably well rehearsed. The complainant was told that the case would be recommended for dismissal. The complainant was informed that he had the right to appeal the recommendation but the appeal would have to be done within fifteen (15) days of his receipt of a certified letter that he would be receiving. The complainant then thanked me for my time. |
| <i>Recommendation</i> | This case is being recommended as a non-meritorious case and recommended for dismissal. |
| <i>Reinstatement</i> | N/A |
| <i>Back Wages</i> | N/A |
| <i>Interest</i> | N/A |
| <i>Punitive Damages</i> | N/A |
| <i>Expungement</i> | N/A |
| <i>Posting</i> | N/A |
| <i>Other Damages</i> | N/A |

Discrimination Investigator

IOSH Administrator

Date